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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 }  
9 UNITED STATES OF AMERICA, } CASE NO: 2:13-cr-00423-JCM-GWF  
10 Plaintiff, }  
11 vs. } **RESPONSE TO GOVERNMENT'S  
12 DANIEL BARNES } MOTION IN LIMINE TO BAR  
13 Defendant. } EVIDENCE OF THE VICTIM'S  
{ ALLEGED SEXUAL BEHAVIOR OR  
{ SEXUAL PREDISPOSITION PURSUANT  
{ TO RULE 403 AND 412 [DOC. #218].  
14 }  
15 }**

16 **Certification:** This Response is Timely Filed.

17 COMES NOW, Defendant, DANIEL BARNES, by and through his attorney of record  
18 LUCAS J. GAFFNEY, ESQ., and hereby submits his Response in Opposition to the  
19 Government's Motion in Limine to Bar Evidence of the Victim's Alleged Sexual Behavior or  
20 Sexual Predisposition Pursuant to Rules 403 and 412 of the Federal Rules of Evidence

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This Response is made and based upon the following Points and Authorities, all pleadings and papers on file herein, and any oral argument deemed necessary by the Court.

DATED this 30<sup>th</sup> Day of March, 2016

## ORONOZ & ERICSSON LLC

/s/ Lucas Gaffney  
LUCAS J. GAFFNEY, ESQ.  
Nevada Bar No.: 12373  
*Counsel for Daniel Barnes*

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   **I.**

3                   **INTRODUCTION**

4                   On February 10, 2016, the government filed its Second Superseding Indictment [Doc. #  
5 201] charging the Defendant, Daniel Barnes (“Barnes”) with one count of Conspiracy to  
6 Commit Sex Trafficking of a Child (18 U.S.C. 1591(a)(1),(b)(2),(c), and 1594(c)); one count of  
7 Transportation of a Minor for Prostitution (18 U.S.C. § 2423(a)); one count of Sex Trafficking  
8 of a Child (18 U.S.C. § 1591(a), (b)(2) and (c)); and one count of Conspiracy to Commit Sexual  
9 Exploitation of a Child (production of child pornography) (18 U.S.C. § 2251(a) and (e)).  
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11                  On March 13, 2016, the government filed its Motion in Limine to Bar Evidence of the  
12 Victim’s Alleged Sexual Behavior or Sexual Predisposition.  
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14                  **II.**

15                  **LEGAL ARGUMENT**

16                  A. **THE COURT SHOULD ADMIT LIMITED EVIDENCE OF J.M.’S**  
17                  **EXPERIENCE AS A PROSTITUTE.**

18                  Contrary to the Government’s assumption, at trial, Mr. Barnes will not seek to introduce  
19 evidence of J.M.’s sexual behavior or predisposition for the purpose of proving J.M.’s consent  
20 to sex trafficking or sexual exploitation, unless the Government employs a theory that Barnes  
utilized force, fraud, or coercion against J.M. At this time, the Government does not appear to  
be proceeding under such a theory.

21                  However, Mr. Barnes would seek to introduce the mere fact that J.M. had worked as a  
22 prostitute for a pimp both before she met Mr. Barnes, and after she and Mr. Barnes parted  
23 company. To be clear, Mr. Barnes would not seek to admit any specific sex act, or intimate  
24 detail, or sexual innuendo regarding J.M.’s experiences as a prostitute, only that she had worked

1 as a prostitute for a pimp prior to, and subsequent to, meeting Mr. Barnes.<sup>1</sup> Indeed, the  
2 government is likely to elicit the same information from their own witnesses in order to tell the  
3 complete story of this case. Thus, the introduction of this information would not lead to an  
4 invasion of privacy or sexual stereotyping. As such, Mr. Barnes submits that this evidence does  
5 not fall under the ambit of Federal Rule of Evidence 412, however, if this Court deems  
6 otherwise, the evidence would be admissible because its exclusion would violate Mr. Barnes'  
7 constitutional rights to due process, confrontation, and right to present a complete defense.<sup>2</sup>

8       The Government cites to Torres for the proposition that the Ninth Circuit has found FRE  
9 412 applicable in a sex abuse case when a defendant attempted to impeach the victim to show  
10 her capability to fabricate a story [See Doc. # 218, page 7]. Specifically, in Torres, the defense  
11 sought to introduce an incident where the victim was potentially participating in an elicit sex  
12 act, which occurred six months after the charged offense. United States v. Torres, 937 F.2d  
13 1469, 1472 (9th Cir. 1991). Torres is distinguishable from the instant case in that it discusses the  
14 application of FRE 412 in the context of rape and sexual assault. Id. In fact, FRE 412 is known  
15 as the federal rape shield law and the vast majority of the case law discussing its application  
16 pertains to cases of rape or sexual assault. As such, Mr. Barnes submits that the application  
17 discussed in Torres is inapplicable under the facts of this case because he does not seek to

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19 <sup>1</sup> According to J.M.'s statement, she first met Barnes' co-defendant while working as a  
20 prostitute for another pimp. After J.M. and Barnes parted company, J.M. resumed working for  
21 the same pimp until the police arrested J.M. for prostitution. J.M.'s arrest prompted her to give  
22 an incriminating statement about her relationship with Barnes.

23 <sup>2</sup> To the extent the Court believes that Mr. Barnes has not complied with FRE 412's required  
24 14-day disclosure. Mr. Barnes would submit that under FRE 412(c)(1), and based on the  
foregoing, this Court has good cause to admit the information pursuant to the Advisory  
Committee Notes, which states: "The rule recognizes that in some instances the circumstances  
that justify an application to introduce evidence otherwise barred by Rule 412 will not become  
apparent until trial."

1 introduce any sexual misconduct by J.M., but merely introduce the fact that J.M. had worked as  
2 a prostituted for a pimp who was not Mr. Barnes.

3 Furthermore, the Sixth Amendment provides that “[i]n all criminal prosecutions, the  
4 accused shall enjoy the right to be confronted with the witnesses against him” United States  
5 Constitution, Amendment VI. The Supreme Court has held that incorporated within the right to  
6 confrontation are two types of protections for a criminal defendant: “the right physically to face  
7 those who testify against him, and the right to conduct cross-examination.” Pennsylvania v.  
8 Richie, 480 U.S. 39, 51 (1987) (*citing Delaware v. Fensterer*, 474 U.S. 15, 22 (1985)); *see also*  
9 Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (explaining that the main and essential purpose of  
10 confrontation is to secure the opportunity of cross-examination). Here, the exclusion of Mr.  
11 Barnes’ proposed cross-examination of J.M. regarding her activities as a prostitute would violate  
12 his constitutional right to confront the key witness against him.

13 The right to cross-examination ““includes the opportunity to show [not only] that a  
14 witness is biased, [but also] that the testimony is exaggerated or [otherwise] unbelievable.””  
15 Fowler v. Sacramento Cnty. Sheriff’s Dept., 421 F.3d 1027, 1035 (9th Cir. 2005) (quoting  
16 Ritchie, 480 U.S. at 51-52). In addition, “cross-examination may implicate the Sixth  
17 Amendment even if it is not certain to affect the jury’s assessment of the witness’s reliability or  
18 credibility.” Id. at 1036 (*citing Davis*, 415 U.S. at 317).

19 Here, in a statement provided to Las Vegas Metropolitan Police Detective R. Leung,  
20 J.M., admitted she worked as a prostitute for a pimp named Maserati prior to meeting Mr.  
21 Barnes. J.M. indicated that Maserati gave her rules to adhere to while working for him as a  
22 prostitute. For example, Maserati told J.M. not to talk to other pimps, and not to look other  
23 pimps. J.M. also alleged that Mr. Barnes gave her similar rules. It is critical that Mr. Barnes be  
24 allowed to cross-examine J.M. about her relationship with Maserati in order to show the jury

1 there were sources other than Mr. Barnes where J.M. could have learned about the pimp-  
2 prostitute relationship, thereby raising reasonable doubt as to the details surrounding Mr.  
3 Barnes' alleged recruitment of J.M., which is an element of Trafficking of a Child (18 U.S.C. §  
4 1591). Therefore, J.M.'s previous employment as a prostitute is relevant under Rule 401 of the  
5 Federal Rules of Evidence, and would not serve to confuse the jury. Nor would the information  
6 divert from the real issues in the case because the information is more probative than prejudicial  
7 under Rule 403 of the Federal Rules of Evidence.

8         Additionally, it is anticipated the government will argue to the jury that Mr. Barnes and  
9 Ms. Marquardt advertised J.M. online as a prostitute. The government will attempt to bolster  
10 this assertion by introducing expert testimony indicating it is common practice for pimps and  
11 prostitutes to advertise their services online.<sup>3</sup> In her statement, J.M. indicated that Maserati  
12 posted advertisements for her on Craig's List. As such, it is crucial that Mr. Barnes be allowed  
13 to present J.M.'s relationship with Maserati to the jury in order to show that J.M.'s knowledge  
14 about the common practice of pimps and prostitutes in this regard could have come from a  
15 source other than Mr. Barnes, thereby establishing reasonable doubt as to Mr. Barnes' guilt  
16 regarding J.M.'s recruitment.

17         Lastly, J.M. indicated in her statement that she met Ms. Marquardt while working as a  
18 prostitute, and that it was Ms. Marquardt's proposal that convinced her to work for Mr. Barnes.  
19 Highlighting J.M.'s initial interactions with Ms. Marquardt for the jury are critical to Mr.  
20 Barnes' defense in that they show Ms. Marquardt's role in the alleged recruitment process, and  
21 to what degree, if any, Mr. Barnes recruited, enticed, or harbored J.M., as alleged in Count 2.

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23  
24 <sup>3</sup> See government's Notice of Expert Testimony, page 2. [Doc. #182].

Based on the foregoing, it would violate Mr. Barnes' constitutional rights to exclude the aforementioned evidence which could potentially lead a jury to finding reasonable doubt regarding Mr. Barnes' guilt, as alleged by the government. Accordingly, if the Court deems that J.M.'s employment as a prostitute constitutes the kind of evidence contemplated by FRE 412, the Court must allow this evidence to be admitted because the exclusion of it would violate Barnes' Fifth Amendment right to due process, right to present relevant evidence and his Sixth Amendment right to confront and cross-examine witnesses, and to present a complete defense.

## CONCLUSION

Based on the above, Mr. Barnes respectfully requests that this Honorable Court allow Mr. Barnes, to present limited evidence regarding J.M.'s experience as a prostitute.

DATED this 30<sup>th</sup> Day of March, 2016

**ORONOZ, ERICSSON & GAFFNEY, LLC**

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1                   **CERTIFICATE OF SERVICE**

2       I hereby certify that I am an employee of ORONOZ, ERICSSON & GAFFNEY LLC  
3 and on this 30<sup>th</sup> day of March, 2016, I did serve a true and correct copy of the foregoing by U.S.  
4 District Court CM/EMF Electronic Filing, to:

5                   ALISON HERR  
6                   Assistant United States Attorney  
7                   GREGORY DAMM  
8                   Assistant United States Attorney  
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12                  By: /s/ Lucas Gaffney  
13                  An employee of Oronoz, Ericsson & Gaffney LLC